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March 28, 1994

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: PP Docket No. 93-253
Request for Clarification or Reconsideration

Dear Mr. Caton:

On behalf of the Land Mobile Communications Council, enclosed herewith please find its Request for Clarification or Reconsideration in PP Docket No. 93-253.

Kindly refer any questions or correspondence to the undersigned.

Very truly yours,

Elizabeth R. Sachs

ERS:cls

Enclosure

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
	)	
Competitive Bidding	)	

To: The Commission

REQUEST FOR CLARIFICATION OR RECONSIDERATION

The Land Mobile Communications Council ("LMCC"), by its attorneys, and pursuant to Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully requests clarification or reconsideration of the First Report and Order in this proceeding ("Order" or "R&O").[1] The text of the R&O articulates a reasonable definition of the "unjust enrichment" Congress sought to curb in adopting the legislation now being implemented by the Commission. However, the rules adopted go substantially beyond the area of concern articulated by Congress and defined in the Order. They raise significant administrative and business complexities for both the agency and the industry which will not advance the Congressional objective to which the FCC is responding.

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[1] First Report and Order, In the Matter of Implementation of Sections 309(j) of the Communications Act: Competitive Bidding, PP Docket 93-253, released February 4, 1994.

I. INTRODUCTION

LMCC is a non-profit association of organizations representing users of land mobile radio and providers of land mobile services and equipment. LMCC acts on behalf of the vast majority of public safety, business, industrial, private, common carrier, and land transportation radio users, as well as a diversity of land mobile service providers and equipment manufacturers.

LMCC's membership includes a variety of national associations representing users of the radio spectrum for both private and common carrier purposes. Specifically, LMCC's membership includes the following organizations:

American Association of State Highway and Transportation Officials (AASHTO)
American Automobile Association (AAA)
American Mobile Telecommunications Association (AMTA)
American Petroleum Institute (API)
American Trucking Associations, Inc. (ATA)
Association of American Railroads (AAR)
Association of Public-Safety Communications Officials International, Inc. (APCO)
Cellular Telecommunications Industry Association (CTIA)
Forest Industries Telecommunications (FIT)
Forestry-Conservation Communications Association (FCCA)
Industrial Telecommunications Association, Inc. (ITA)
International Association of Fire Chiefs (IAFC)
International Association of Fish and Wildlife Agencies (IAFWA)
International Municipal Signal Association (IMSA)
International Taxicab and Livery Association (ITLA)
Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC)
National Association of Business and Educational Radio, Inc. (NABER)
National Association of State Foresters (NASF)
Personal Communications Industry Association (PCIA)
Telecommunications Industry Association (TIA)
Utilities Telecommunications Council (UTC)

Many members of LMCC's constituent organizations have been awarded frequencies pursuant to the FCC's random selection procedures. This spectrum has been placed in operation by those licensees, and used to provide valuable services to the public or to satisfy vital, internal communications requirements. While LMCC's members support Congressional and Commission efforts to ensure that FCC licenses not be treated as lottery tickets, producing "unearned" financial windfalls for a fortunate few, they urge the FCC to narrow the rules adopted herein to address the matter of "unjust enrichment" described in the text of the Order.

II. BACKGROUND

The Commission's objective in this stage of this proceeding is statutorily mandated: to prescribe rules which will prevent the unjust enrichment of licensees whose licenses or permits are granted pursuant to the recently revised random selection provisions in the Communications Act.[2] 47 U.S.C. § 309 (i)(4)(C). Although the 1993 legislative changes to the Act strictly limit those instances in which random selection procedures may be used in lieu of a competitive bidding, or auction, process, Congress was nonetheless determined to prevent trafficking in those systems which still qualified for lottery selection.

The text of the R&O accurately describes this Congressional mandate and sets out an appropriately prophylactic regulatory response. The Order explains that the concept of "unjust enrichment" or "speculation in licenses" articulated by Congress arose

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[2] Pub. L. No. 103-66, title VI, § 6002(b)(1)(B), 107 Stat. 388, _____ (1993).

uniquely in the context wherein a license acquired by lottery was transferred for substantial profit prior to providing service to the public.[3] R&O ¶ 11 and F.N. 4. The R&O further clarifies that the stringent statutory limitations on the instances in which licenses will henceforth be permitted to be issued pursuant to random selection procedures, most of which involve "non-commercial" systems, obviate the need for extensive regulatory measures to prevent this abuse. Rather, the Order concludes that transfer disclosure requirements will permit the FCC to evaluate whether further regulatory action is required to prevent possible unjust enrichment.

The text of the Order is unambiguous in its delineation of the context in which transfer disclosure requirements are to apply. The Order limits the concept of unjust enrichment to those instances in which an authorization is transferred before the transferor has initiated service to the public. This is the essence of speculating or trafficking in licenses, and is unquestionably the practice Congress intended to curb.[4]

The rules adopted in the Order fail to reflect this definitional parameter. They require all applicants for voluntary transfers of control or assignments to submit disclosures regarding compensation if the subject license was acquired by the transferor or assignee through a system of random selection, even if the transfer is proposed after

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[3] See H.R. Rep. No. 213, 103d Cong., 1st sess. 489-90 (1993).

[4] If the Congressional objective was to examine broadly the compensation to transferors of FCC systems, even those which had initiated service, there would be no rational basis for limiting its review to licenses acquired by lottery. For example, Congress and the FCC presumably would be equally interested in the profits generated by the sale of broadcast systems wherein the licenses were acquired directly from the FCC at no cost to the licensees now proposing to transfer the authorizations.

service initiation. The rules adopted in this proceeding are, therefore, inconsistent with both Congress's directive and a clear reading of the accompanying text.[5] They will not advance the laudable policy objectives intended in this proceeding.

III. DISCUSSION

A. The Inclusion in the Rules of All Spectrum Acquired in Any Random Selection Procedure is Overly Broad

The Commission has had authority to award licenses by random selection since 1983. It has held hundreds, if not thousands, of lotteries in the private and common carrier land mobile and microwave services during this period. Thousands, perhaps tens of thousands, of frequencies have been assigned to licensees as a result of those lotteries. In virtually all of these services, certain frequencies have been awarded by lottery if there are mutually exclusive applicants in a particular area for a specific frequency. If not, the frequency is assigned without any need for competitive evaluation. Thus, it is not always possible to determine by reviewing an authorization whether or not a particular frequency was granted in a lottery.[6]

For example, 800 MHz SMR frequencies were originally subdivided into "old" and "new" categories. The "new" 800 MHz SMR frequencies were assigned in 1983 via

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[5] The text of the Order is itself ambiguous as to whether the FCC believes the Congressional directive was intended to encompass the transfer of unconstructed stations authorized prior to the legislation. It would appear that equivalent policy considerations would apply to pre- and post-legislation lottery grants.

[6] There are some services in which all licenses to date were granted by random selection; e.g. cellular markets 90 to 305 and the 428 RSAs, 900 MHz SMR and 220 MHz.

lottery in markets where there were sufficient applicants to create mutual exclusivity. They were assigned on a first-come, first-served basis outside those geographic areas. Subsequently, as the FCC recovered "new" frequencies for failure to construct or to load, the agency published lists of recovered channels for which parties could apply. Lotteries were held on a frequency by frequency, market by market basis throughout the country if there were mutually exclusive applicants. In some instances, these frequencies may have been assigned to a new licensee, but that system may subsequently have been expanded with non-lottery channels. Alternatively, the frequencies may have gone to an existing operator for expansion of a system which might have been comprised of lottery and non-lottery channels, and which may have added lottery or non-lottery frequencies since then. It is LMCC's understanding that the FCC did not retain all records associated with these numerous mini-lotteries. Thus, it would be impossible to verify under what procedure a specific "new" 800 MHz SMR frequency had been granted.

The licensees of those systems are also likely to be uncertain about the genesis of a particular channel. As described above, SMR systems grow incrementally as the operator documents sufficient customers to justify additional spectrum. 47 C.F.R. § 90.627(b). The vast majority of SMR businesses include a combination of frequencies assigned directly by the FCC upon application, those awarded in a lottery, and those acquired from another party. Because the channels are fungible when combined in a system or network of systems, there would be no reason for licensees to have retained records detailing the provenance of discrete frequencies. They will be forced to rely on anecdotal memory to determine the origin of their spectrum and, therefore, their

obligation to comply with the rule. Common carrier paging operators may be in a comparable situation as they too rely on channel accretion to expand their businesses. It is inconceivable that the Commission or Congress would have intended to adopt a requirement dependent upon a factor which cannot be verified by either the parties to the transaction or the FCC itself.

Moreover, there is little likelihood that the rules, as written, will produce useable data responsive to the expressed Congressional concern. As explained in the Order, the legislative directive was addressed to trafficking in licenses; that is, to the sale of the authorization itself prior to providing the service proposed in the transferor's original application. The submission of all related documents is relevant in that context. The acquisition of an unconstructed system is a relatively uncomplicated, and exceedingly uncommon, event.[7] The asset being acquired is the FCC license and it is typically sold on a stand-alone basis.

The same is not true when the license transfer is part of the purchase of an operating business. In those instances, the compensation will be attributable to a combination of tangible and intangible assets whose valuations are based on business and tax considerations. The rules adopted in the Order would require the submission of this documentation whenever a fully constructed communications business is sold which includes even a single lottery frequency. It is not clear how the FCC will calculate the

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[7] LMCC is not aware that the FCC has approved the transfer of unconstructed systems except in certain situations in the cellular service. Bill Welch, 3 FCC Rcd 6502 (1988). In fact, the Order states specifically that existing construction benchmarks and associated transfer restrictions adequately deter unjust enrichment in services such as SMR and 220 MHz. Order F.N. 14. 47 C.F.R. §§ 90.609(b), 90.631(b), 90.709(a).

value it believes was placed on a particular lottery frequency(s) which is likely assigned to a system(s) which also uses non-lottery spectrum and which itself may be only a single station being acquired in the larger transaction. Because the asset purchase agreements and related documents required by the rules encompass the entire acquisition, and are not typically segregable by frequency, parties will be required to file all of the materials relating to the transaction if they verify or suspect that it includes even a single frequency granted pursuant to a lottery.

Moreover, the rules adopted would apply to any licensee proposing to assign a frequency acquired in a random selection proceeding. This would include non-commercial private licensees which were assigned 900 MHz multiple address system or 220 MHz trunked frequencies by lottery should they elect to sell some or all of their assets. Communications systems are auxiliary to the primary business of these licensees. These facilities are used to promote internal operational efficiencies rather than as an independent profit center. Nonetheless, to the extent that a company using a frequency acquired by lottery is to be sold, and the FCC license for the associated communications system assigned or transferred, the materials relating to that transaction would need to be submitted for Commission review. Again, this requirement reaches far beyond the abuse observed by Congress and will necessitate the submission of numerous documents which the FCC is neither statutorily directed nor sufficiently staffed to review.

B. The FCC May be Unable to Protect the Confidentiality of the Information Provided

The data required to be disclosed under these Rules would be voluminous, and would contain extensive financial and strategic information not routinely available to the

public.[8] While these materials might prove to be of little utility to the FCC for the reasons described above, the information contained therein could yield important competitive data -- data unavailable from any other source.

It is not certain that this information could be protected from disclosure under the Freedom of Information Act. The FCC rules freely permit the inspection by the public of all files relating to the application for a particular authorization. 47 C.F.R. §§ 0.451, 0.455(c)(12), 0.455(d). As described in the instant rules regarding unjust enrichment, it appears that the materials provided thereunder would be considered part of those files. It is unlikely that the exemption from inspection for commercial and financial information which is privileged and confidential would enable these documents to be withheld from the public. 47 C.F.R. § 0.457(d). Thus, the Commission can be confidant that competitors will endeavor to access this information on a routine basis, as it will reveal negotiating tactics, business and strategic planning matters, as well as financial information. The disclosure of these sensitive, although not necessarily privileged, materials will seriously disadvantage the parties required to provide it, without yielding any countervailing public interest benefit.

V. CONCLUSION

The rules adopted in the R&O are inconsistent with the policy analysis contained in the text of the decision. They are substantially more encompassing than the clear

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[8] A very substantial percentage of private and common carrier land mobile licensees are not publicly held companies. Unlike publicly traded organizations, their business activities, including their acquisitions and sales, are not typically available for review by the public.

Congressional directive that the FCC adopt rules which will prevent extraordinary profit flowing to parties from the sale of lottery licenses before initiation of service to the public. The LMCC therefore requests that the FCC modify its rules to reflect the definition of unjust enrichment prescribed in the Order, consistent with the views expressed herein.

Respectfully submitted,

LAND MOBILE COMMUNICATIONS COUNCIL

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March 28, 1994

CERTIFICATE OF SERVICE

I, Cheri Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 28th day of March, 1994, caused to have hand-delivered, a copy of the foregoing Request for Clarification or Reconsideration to the following:

Cheri Skewis

Cheri Skewis

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